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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JIN XIN YE,
YUNXIA LIU,
LIAN JIN WANG
Petitioners,

v.

ERIC H. HOLDER,
Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CETIORARI

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QUESTIONS PRESENTED

Pursuant to 8 C.F.R. § 1003.1(d)(3)(i), the Board of Immigration Appeals is prohibited from engaging in a *de novo* review of an immigration judge's factual findings. The questions presented are:

1. Whether the Second Circuit Court of Appeals erred in concluding that the Board of Immigration Appeals did not exceed its scope of review when it overturned the Immigration Judge's finding that Petitioner established a well-founded fear of future persecution.

2. Whether the Second Circuit erred in characterizing the issue of whether an asylum applicant has demonstrated a well-founded fear of future persecution as a factual issue, rather than a legal issue, contrary to holdings of several circuit courts.

PARTIES TO THE PROCEEDINGS BELOW

Jin Xie Ye, Petitioner
Yunxia Liu, Petitioner
Lian Jin Wang, Petitioner
Eric H. Holder, U.S. Attorney General, Respondent

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INTRODUCTION

The decisions below merit this Court's review because they allow the Board of Immigration Appeals ("BIA" or "Board") to engage in fact-finding, contrary to the Board's own regulations and practice manual. Furthermore, the decisions contradict the position of several circuit courts that the issue of whether an alien has demonstrated a well-founded fear of persecution is a factual issue, rather than a legal issue. This in turn results in the application of inconsistent standards of review by the BIA and the circuit courts in deciding immigration appeals. Therefore, review is warranted in order to ensure uniformity in the application of the law.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit, dated July 9, 2009, denying Petitioner Jin Xin Ye's ("Ye") petition for review is unreported. *Ye v. Holder*, No. 07-4088 (2d Cir. July 9, 2009). The decision of the Board of Immigration Appeals, dated August 30, 2007, vacating the Immigration Judge's decision is unreported. *In re Ye*, No. A96 253 582 (BIA Aug. 30, 2007). The decision of the Immigration Judge granting Ye's application for asylum, dated November 21, 2003, is unreported. *In re Ye*, No. A96 253 582 (United States Immigration Court, New York, New York, Nov. 21, 2003).

The Second Circuit's decision, dated July 9, 2009, denying Petitioners Yunxia Liu and Lian Jin Wang's petition for review is unreported. *Liu & Wang v. Holder*, No. 08-4785 (2d Cir. July 9, 2009). The decision of the Board of Immigration Appeals, dated September 10, 2008, vacating the Immigration Judge's decision is unreported. *In re Liu & Wang*, No. A97 478 691 & No. A73 176 913 (BIA Sep. 10, 2008). The decision of the Immigration Judge, dated November 21, 2003, granting Liu and Wang's application for asylum is unreported. *In re Liu & Wang*, No. A97 478 691 & No. A73 176 913 (United States Immigration Court, New York, New York, Dec. 1, 2004).

JURISDICTION

The United States Court of Appeals for the Second Circuit denied Petitioners' petitions for review on July 9, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

8 C.F.R. § 1003.1(d)(3) provides:

> (3) Scope of review. (i) The Board will not engage in de novo review of findings of fact determined by an immigration judge. Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.
>
> (ii) The Board may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges de novo.
>
> [...]
>
> (iv) Except for taking administrative notice of commonly known facts such as current events or the contents of official documents, the Board will not engage in factfinding in the course of deciding appeals. A party asserting that the Board cannot properly resolve an appeal without further factfinding must file a motion for remand. If further factfinding is needed in a particular case, the Board may remand the

proceeding to the immigration judge or, as appropriate, to the Service.

STATEMENT OF THE CASE

Jurisdiction of the Court of Appeals

The United States Court of Appeals for the Second Circuit had jurisdiction over Petitioners' petitions for review pursuant to the Immigration and Nationality Act ("INA") § 242(a)(1), 8 U.S.C. § 1252(a)(1), which provides judicial review of a final order of removal.

Proceedings Below

Petitioner Jin Xie Ye, a native and citizen of the People's Republic of China, entered the United States without inspection on or about August 20, 2000. *See* Pet. App. 13a. As relief from removal, she filed applications for asylum, withholding of removal under 8 U.S.C. § 1231(b)(3), and relief under the Convention Against Torture ("CAT"). Ye's asylum application alleged that she was harassed by a village official in China who wanted to marry her. Pet. App. 14a. She also claimed that she would be persecuted upon returning to China on account of her violation of the country's family planning policy. Specifically, she claimed that she would be forced to undergo a sterilization procedure because she exceeded the allowable birth limit by having two daughters in the United States. Pet. App. 15a.

She thus claimed asylum eligibility under the amended definition of a refugee, 8 USC § 1101(a)(42)(B), which provides that:

> a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

In support of her application, Ye testified that her mother was forcibly sterilized after having two children. Pet. App. 15a. Based on Petitioner's testimony and the evidence in the record, the IJ granted Ye asylum on November 21, 2003. Pet. App. 16a. In his decision, the IJ observed that according to the U.S. Department of State's Consular Information Sheet for China, children born abroad to Chinese nationals who have not permanently settled abroad are treated solely as Chinese citizens when in China. Pet. App. 15a. Accordingly, the IJ found that Ye had

established a well-founded fear of persecution based on China's family planning law. *Id.*

The Department of Homeland Security ("DHS") appealed and on July 20, 2005, the BIA sustained DHS's appeal, vacated the IJ's decision and ordered Ye removed from the United States. In its decision, the Board found that Ye "provided few facts about the basis for her claim and insufficient documentary evidence to demonstrate that a person in her circumstances – a parent of two United States citizen children – would have a reasonable fear of persecution." Pet. App. 11a.

Ye then sought judicial review of the BIA's decision. On December 22, 2006, the Second Circuit dismissed her petition for review and remanded the case to the BIA for further proceedings pending the agency's precedential decision in *Matter of S-Y-G-*, 24 I. & N. Dec. 247 (BIA 2007). Pet. App. 7a-8a-.

On remand, the BIA again vacated the IJ's grant of asylum. The Board noted that in *Matter of S-Y-G-*, 24 I. & N. Dec. 247 (BIA 2007), it found that the documents submitted in that case "do not specifically show any likelihood that she or similarly situated Chinese nationals will be persecuted as a result of the birth of a second child in the United States." Pet. App. 6a. The Board further observed that in *Matter of J-W-S-*, 24 I. & N. Dec. 185 (BIA 2007), it found that "[t]he evidence of record suggests that if a returnee who has a second child while outside China is penalized at all upon return, the sanctions

would be fines or other economic penalties." *Id.* In its decision, the Board did not address Ye's credibility or the IJ's reliance on the State Department's Consular Information Sheet. Rather, the Board appeared to substitute its own assessment of the evidence in *Matter of S-Y-G-* and *Matter of J-W-S-* for the IJ's assessment Ye's Petitioner's particular facts and evidence.

On appeal to the Second Circuit, Ye argued, among other things, that the BIA improperly conducted a *de novo* review of the evidence, thereby exceeding its limited scope of review under 8 C.F.R. § 1003.1(d)(3)(i). In its summary order of July 9, 2009, the Second Circuit denied the petition for review. The Court found that "contrary to Ye's argument that the BIA committed legal error by examining the record evidence *de novo*, the BIA properly made a legal determination that her evidence failed to demonstrate the objective reasonableness of her fear." Pet. App. 3a.

On the same day, the Second Circuit issued a decision denying Petitioners Yunxia Liu and Lian Jian Wang's petition for review. Liu and Wang are husband and wife. They applied for asylum based on their violation of China's family planning policy, alleging that they would be subject to persecution due to having two children in the United States. The IJ granted Liu and Wang's application for asylum on December 1, 2004. In her decision, the IJ noted that both Liu and Wang testified credibly about relatives in China who were forcibly sterilized

or forced to undergo an abortion for violating the family planning law. Pet. App. 44a-47a. The IJ also noted that according to the State Department's 2004 Asylum Profile for China, families with U.S. born children receive no special treatment under China's family planning law, unless at least one parent has residency rights in the U.S. Pet. App. 49a-50a.

On May 12, 2005, the BIA vacated the IJ's grant of asylum and ordered Liu and Wang removed. On December 19, 2006, the Second Circuit granted their petition for review and remanded to the BIA for further proceedings. The Court instructed the Board to consider Petitioners' application for asylum in light of the additional background documents assessed in *Shou Yung Guo v. Gonzales*, 463 F.3d 109 (2d Cir. 2006). Pet App. 35a-36a. On remand, the Board affirmed its previous decision vacating the IJ's grant of asylum. In its decision, the Board relied exclusively on its precedential decisions in *Matter of S-Y-G-*, 24 I. & N. Dec. 247 (BIA 2007); *Matter of J-W-S-* 24 I. & N. Dec. 185 (BIA 2007); and *Matter of J-H-S-*, 24 I. & N. Dec. 196 (BIA 2007). The Board did not explain why the IJ's factual findings were clearly erroneous and instead relied solely on its assessment of the evidence in the above cases. Pet. App. 29a-31a.

On March 27, 2008, the Second Circuit remanded the proceedings to the Board pursuant to a stipulation by the parties. The Court's order instructed the Board to issue a new decision "based on an evaluation of the particular facts

and evidence in this case." Pet. App. 27a. On remand for the second time, the Board affirmed its previous decisions vacating the IJ's grant of asylum. In doing so, the Board appeared to conduct a *de novo* assessment of the evidence of record, rather than explaining why the IJ's findings were clearly erroneous. For example, the Board found that the 2005 Asylum Profile did not support Liu and Wang's claimed fear of persecution, despite the IJ's contrary finding. Pet. App. 22a-23a.

On July 9, 2009, the Second Circuit denied Liu and Wang's petition for review of the BIA's decision. The Court referenced the applicable standards of review for agency findings of fact and legal conclusions, but did not indicate what specific standard it applied to the BIA's decision. Pet. App. 18a-19a.

REASONS FOR GRANTING THE PETITION

I. THE DECISIONS BELOW PERMIT THE BIA TO EXCEED ITS SCOPE OF REVIEW IN CONTRADICTION TO ITS REGULATIONS AND PRACTICE MANUAL

The decisions below permit the BIA to engage in impermissible fact finding, contrary to the agency's own regulations, by simply labeling a factual issue as a legal one.

Under 8 C.F.R. § 1003.1(d)(3), the BIA may not engage in *de novo* review of an IJ's factual findings. Rather, such findings may only be reviewed for clear error. The Supplementary Information to this regulation states that in applying the clearly erroneous standard, "[a] factfinding may not be overturned simply because the Board would have weighed the evidence differently or decided the facts differently had it been the factfinder." 67 Fed. Reg. at 54,888-89 ("Supplementary Information"); *see also Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985). This limitation of the Board's scope of review is also contained in the BIA's practice manual, which provides official guidance on BIA practice and procedures. BIA Prac. Man., Ch. 1.4(c)(i) (2004)

In *Matter of A-S-B-*, 24 I. & N. Dec. 493, 496 (BIA 2008), the BIA held that "[t]he clearly erroneous standard [...] does not apply to the application of legal standards, such as whether the facts established by an alien amount to 'past persecution' or a 'well-founded fear of persecution.'" (Internal citation omitted). In *Matter of V--- K*, 24 I. & N. Dec. 500, 501 (BIA 2008), the Board further clarified that predictions of what may occur in the future are "not the sort of '[f]acts determined by the Immigration Judge' that can only be reviewed for clear error. 8 C.F.R. § 1003.1(d)(3)(i) (2008)." Accordingly, it held that

> an Immigration Judge's prediction or finding regarding the likelihood that an alien will be tortured may be reviewed *de novo* because, like a conclusion relating to whether a statutorily prescribed chance of persecution or level of hardship exists, it relates to whether the ultimate statutory requirement for establishing eligibility for relief was met and is therefore a mixed question of fact and law, or a question of "judgment." 8 C.F.R. § 1003.1(d)(3)(ii).

24 I. & N. Dec. at 501-2.

Despite the Board's decisions in *Matter of A-S-B-*, *supra*, and *Matter of V--- K*, *supra*, the majority of the circuit courts have characterized conclusions regarding whether an asylum applicant has established a well-founded fear of future persecution as factual determinations that may not be reviewed *de novo*. *See infra*. The Second Circuit's conclusion below in *Ye v. Holder*, No. 07-4088 (2d Cir. July 9, 2009), that the BIA did not exceed its scope of review because it made a *legal* determination that Ye failed to establish the requisite fear of future persecution thus contradicts the position of its sister courts.

The decisions below also clash with the Second Circuit's own approach to reviewing BIA determinations regarding an alien's fear of future persecution. In general, the Court has reviewed such determinations under the substantial evidence standard, the standard of review normally applied

to findings of fact. *See Jian Hui Shao v. Mukasey*, 546 F.3d 138, 162-64 (2d Cir. 2008); *Zhao Jin Lin v. AG of the United States*, 441 F.3d 193, 195 (2d Cir. 2006). This in turn creates further confusion as to what standard of review should be applied to agency determinations regarding an alien's fear of future persecution.

A. The Majority Of The Circuit Courts Have Characterized The Issue Of Whether An Asylum Applicant Has Demonstrated A Well-Founded Fear Of Future Persecution As A Factual Issue Which May Not Be Reviewed *De Novo*

In contrast to the Board's approach, several circuit courts have expressly characterized the question of whether an asylum applicant has established a well-founded fear of future persecution as a factual question. *See, e.g., Kayembe v. Ashcroft*, 334 F.3d 231, 234 (3d Cir. 2003) (stating that "[w]hether or not Kayembe has demonstrated past persecution or a well-founded fear of future persecution is a factual question that we review under the substantial evidence standard."); *Thomas v. Gonzales*, 409 F.3d 1177, 1182 (9th Cir. 2005) (noting that it reviews the BIA's factual determinations, "including its finding of whether an applicant has demonstrated a 'well-founded fear of

persecution,'" for substantial evidence), *vacated on other grounds* by *Gonzales v. Thomas*, 547 U.S. 183 (2006); *Xue Zhen Chen v. Gonzales*, 470 F.3d 1131, 1134 (5th Cir. 2006).

What's more, the majority of the circuit courts, while not expressly characterizing this issue as "factual," have reviewed the Board's findings regarding whether an asylum applicant has established a well-founded fear of persecution under the "substantial evidence" standard, the standard of review generally applied to agency findings of fact. *See, e.g.*, *Mukamusoni v. Ashcroft*, 390 F.3d 110, 118-119 (1st Cir. 2004) (applying the "substantial evidence" standard to the BIA's determination that the applicant failed to establish past persecution or a well-founded fear of future persecution); *Diallo v. Holder*, 2009 U.S. App. LEXIS 15089, 2009 FED App. 0448N, 22-23 (6th Cir. 2009); *Mekhtiev v. Holder*, 559 F.3d 725, 729-730 (7th Cir. 2009); *Zacarias-Velasquez v. Mukasey*, 509 F.3d 429, 434 (8th Cir. 2007); *Refahiyat v. United States Dep't of Justice INS*, 29 F.3d 553, 556-7 (10th Cir. 1994); *Mohammed v. United States AG*, 547 F.3d 1340, 1346-1348 (11th Cir. 2008). The Second Circuit has itself held that the "clearly erroneous" standard applies to factual findings related to the objective reasonableness of a well-founded fear of persecution. *See Nepravishta v. Gonzales*, 227 Fed. Appx. 9, at 11 (2d Cir. 2007) ("We further find that the BIA exceeded the scope of its review in failing to apply the clearly erroneous standard to the IJ's findings related to the

objective reasonableness of [the applicant's] fear of future persecution.").

The circuit courts, including the Second Circuit, have not hesitated in vacating BIA decisions where the agency exceeded its scope of review by engaging in impermissible fact finding. *See, e.g., Fen Yong Chen v. Bureau of Citizenship & Immigration Servs.*, 470 F.3d 509 (2d Cir. 2006); *Mei Qin Xie v. Attorney General*, No. 07-2774, 2009 U.S. App. LEXIS 19035 (3d Cir. August 24, 2009); *Tran v. Gonzales*, 447 F.3d 937 (6th Cir. 2006); *Brezilien v. Holder*, 565 F.3d 1163 (9th Cir. 2009); *Kabba v. Mukasey*, 530 F.3d 1239 (10th Cir. 2008).

In *Tran v. Gonzales*, 447 F.3d 937 (6th Cir. 2006), the Sixth Circuit found that the BIA applied an incorrect standard of review in vacating the IJ's grant of relief under the Convention Against Torture. Despite the presentation of unrebutted expert testimony as to the petitioner's likely treatment upon return to his home country, the Board found that there were several deficiencies in the evidence and thus, the petitioner did not satisfy his burden of proof. The Court remanded the proceedings because there was no evidence of what standard of review the Board employed and because "BIA review under an incorrect standard of review implicates [an applicant's] due process rights." *Tran v. Gonzales*, 447 F.3d 937 at 944. It should be emphasized that in *Tran*, the fact at issue related to the degree of possibility that the petitioner would face torture if he returned to his country.

The Court nevertheless implied that such future predictions constitute the kind of facts that the BIA may not review *de novo*. *Cf. Matter of V--- K*, 24 I. & N. Dec. 500, 501 (BIA 2008).

The Third Circuit took a similar approach in a recent case with similar facts as Petitioners' cases. In *Mei Qin Xie v. Attorney General*, No. 07-2774, 2009 U.S. App. LEXIS 19035 (3d Cir. August 24, 2009), the Third Circuit found that the BIA improperly engaged in a *de novo* review of the record when it overturned the IJ's finding that the petitioner "established a reasonable possibility that that if she were to return to China with her children...she could suffer significant financial harm and be subject to a forced abortion or sterilization with respect to her current pregnancy." *Mei Qin Xie v. Attorney General*, at 6. The Third Circuit stated that "[t]his is a factual finding which the BIA should have reviewed for clear error." *Id.* The Court then illustrated how the BIA improperly applied its standard of review. For example, the Board cited to parts of the Country Condition reports which contradicted the IJ's findings, while apparently ignoring the parts that supported the IJ's findings. *Id.* at 6-7. The Court found that such review was not consistent with the "clearly erroneous" standard and remanded the proceedings to the BIA to conduct a proper analysis.

The Second Circuit's decision below in *Ye v. Holder*, No. 07-4088 (2d Cir. July 9, 2009) is in clear conflict with the above cases which stand for the proposition that the BIA may not review *de*

novo an IJ's determination that an alien has established a well-founded fear of persecution. While the Second Circuit attempted to characterize this issue as a legal one, this is contradicted by the record. In its *In re Ye*, No. A96 253 582 (BIA August 30, 2007), the Board did not make any indication that it was vacating the IJ's grant of asylum on legal grounds. Rather, the Board's decision appeared to be based on its view that there were several deficiencies in Ye's evidence. In reaching its conclusion, the Board apparently substituted its own assessment of the evidence on record in *Matter of S-Y-G-* and *Matter of J-W-S-* for the IJ's assessment of Ye's particular facts and evidence. Under these circumstances, it cannot be said that the Board's approach in deciding Ye's appeal was a "legal" one.

The decision below in *Liu & Wang v. Holder*, No. 08-4785 (2d Cir. July 9, 2009) further complicates the legal landscape. In that case, it is clear that the Board assessed the evidence *de novo*. However, in affirming the BIA's decision, the Second Circuit did not identify the particular standard of review it applied to the BIA's factual findings.

B. The Decisions Below Conflict With The Second Circuit's Own Approach To Reviewing BIA Decisions

The decision below in *Ye v. Holder*, *supra*, conflicts not only with the position of a majority of

the circuit courts; it also conflicts with the Second Circuit's own approach to reviewing BIA decisions.

In *Ye*, the Court relied on *Jian Hui Shao v. Mukasey*, 546 F.3d 138 (2d Cir. 2008) to conclude that the Board did not engage in impermissible fact-finding. In *Shao*, 546 F.3d at 162, the Court observed that

> [...] the BIA did not conduct *de novo* review of the IJ's critical finding of fact, *i.e.*, that Ji Wen Shi had testified credibly to a fear of forced sterilization on removal to China. Rather, on initial appeal from the grant of relief in favor of Ji Wen Shi, the BIA made a legal determination that, while such credible testimony was sufficient to demonstrate a genuine subjective fear of future persecution, more was needed to demonstrate the objective reasonableness of that fear.

The Court in *Shao* further noted that "to the extent the BIA itself reviewed evidence and made factual findings on the element of objective reasonableness, it did so with the apparent consent of the parties." *Id.* It then reviewed the Board's determination that petitioner Ji Wen Shi failed to demonstrate a well-founded fear of future persecution, curiously, under the "substantial evidence" standard. 546 F.3d at 162-164.

The Second Circuit's reasoning in *Shao* is internally inconsistent and creates further confusion regarding the different standards of review for factual findings and legal conclusions. The Court first characterized the issue of whether an alien has established a well-founded fear of future persecution as a legal determination which the Board may review *de novo*. However, the Court then reviewed this alleged "legal determination" under the substantial evidence standard, the standard of review that is generally applied to findings of fact. *See Islami v. Gonzales*, 412 F.3d 391, 396 (2d Cir. 2005).

If conclusions regarding an alien's fear of future persecution can truly be characterized as "legal," then the Court's application of the substantial evidence standard to such conclusions allows the Board to escape any meaningful review. Instead, such legal conclusions must be subject to *de novo* review by the circuit courts. If, on the other hand, such conclusions are "factual," then the Board is only permitted to assess the evidence of record to the extent necessary to determine whether the IJ's findings were clearly erroneous. In this case, to permit the Board to review *de novo* an IJ's conclusion that an asylum applicant has established a well-founded fear of persecution would essentially transform the agency into a trier of fact that is not subject to any effective review process.

C. The Board Should Not Be Allowed To Disregard It's Own Regulations

This Court has held that "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (citations omitted). *See also Suciu v. Immigration & Naturalization Service*, 755 F.2d 127, 129 (8th Cir. 1985) ("[...] certainly agencies of the federal government, once they have laid down procedures by regulation, are bound to follow them.").

While the regulations governing the BIA's review standards were issued to improve the effectiveness and efficiency of the agency's adjudication procedures, this is not the only goal achieved by the procedural reforms. The Supplementary Information to the regulations observes that adopting the "clearly erroneous" standard of review for factual findings recognizes "that immigration judges may be better positioned than the Board to decide factual issues, including issues of credibility." 67 Fed. Reg. at 54,889. It is not difficult to understand this rationale, as BIA appeals are decided without evidentiary hearings. However, allowing the Board to assume a fact-finding role not only risks the accuracy of the Board's review, it also risks violating an alien's right to due process. *See Tran v. Gonzales*, 447 F.3d 937 at 944.

It is well established that the Fifth Amendment entitles aliens to due process of law in

immigration proceedings. *Reno v. Flores*, 507 U.S. 292, 306 (1993). An alien's right to due process includes the right to a full and fair evidentiary hearing at which he may be heard and present evidence in support of his claim. *See, e.g.*, *Lin v. U.S. Dep't of Justice*, 453 F.3d 99, 104 (2d Cir. 2006); *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000); *Nazarova v. INS*, 171 F.3d 478, 482-83 (7th Cir. 1999). Permitting the Board to engage in a *de novo* determination of contested facts without conducting a hearing infringes upon an alien's right to a full and fair evidentiary hearing. In overturning an IJ's grant of asylum, the Board is only permitted to review the evidence to the extent necessary to determine whether the IJ's assessment of the evidence was clearly erroneous. If, instead, the Board reviews the evidence *de novo*, this is akin to conducting an *in absentia* hearing on the merits of the applicant's asylum application. Such a procedure is in flagrant violation of an alien's right to due process.

Thus, the Board's limited scope of review serves both as a mechanism to ensure efficiency as well as an important safeguard of an alien's right to due process. Accordingly, the Board may not disregard the limits of its review authority under 8 C.F.R. § 1003.1(d)(3). *Morton v. Ruiz*, 415 U.S. at 235.

II. THE DECISIONS BELOW INCREASE THE APPLICATION OF INCONSISTENT STANDARDS OF REVIEW BY THE BIA AND THE CIRCUIT COURTS

This Court should grant the instant petition to ensure uniformity in the application of the law. The decisions below create further confusion regarding the proper standards of review that should be applied by the Board and the circuit courts in deciding immigration appeals. Under the current state of the law, the Board is very likely to engage in fact-finding in the future, and the likelihood of having such an error corrected will very much depend on which circuit has jurisdiction over the case. This creates the danger that the Board may reach opposite results in similar cases, depending on which circuit's law it is bound by. *See Rosendo-Ramirez v. INS*, 32 F.3d 1085, 1091 (7th Cir. 1994) ("The BIA cannot achieve its goal of uniform application of the laws when the circuits are split and its decisions are subject to review potentially in any circuit."). If Petitioners' cases arose in the Third Circuit, it is very likely that their proceedings would have been remanded to the Board to decide their appeals under the correct standard of review. *See Mei Qin Xie v. Attorney General*, No. 07-2774, 2009 U.S. App. LEXIS 19035 (3d Cir. August 24, 2009).

Given the large number of asylum applicants with claims based on China's family planning policy, it is inevitable that the BIA and the circuit courts will adjudicate numerous cases similar

to Petitioners' in the future. *See Jian Hui Shao v. Bd. of Immigration Appeals*, 465 F.3d 497 at 502 (noting that the petitioner's circumstances of having two children in violation of China's family planning policy, "are shared by innumerable potential asylum applicants, and claims similar to his have been advanced by many petitioners before this and other courts."). Without this Court's intervention, it is very likely that such cases will continue to receive disparate treatment on appeal.

"National uniformity in the immigration and naturalization laws is paramount: rarely is the vision of a unitary nation so pronounced as in the laws that determine who may cross our national borders and who may become a citizen." *Rosendo-Ramirez v. INS*, 32 F.3d 1085, 1091 (7th Cir. 1994). The Board has itself recognized that

> [t]he laws that we administer and the cases we adjudicate often affect individuals in the most fundamental ways. We think that all would agree that to the greatest extent possible our immigration laws should be applied in a uniform manner nationwide, particularly where the most significant aspects of the law are in issue.

Matter of Cerna, 20 I. & N. Dec. 399, 408 (BIA 1991).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GARY J. YERMAN
Counsel of Record
401 Broadway, Suite 1210
New York, NY 10013
(212) 219-2374

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 07-4088-ag
Filed: July 9, 2009

JIN XIN YE,

Petitioner

v.

ERIC H. HOLDER JR., UNITED STATES ATTORNEY GENERAL,

Respondent.

Judges Present: Dennis Jacobs, *Chief Judge*, Jon O. Newman, John M. Walker, Jr., *Circuit Judges*.

For Petitioner: Gary J. Yerman, New York, NY.

For Respondent: Jeffrey S. Bucholtz, *Acting Assistant Attorney General*; Francis W. Fraser, *Senior Litigation Counsel*; Susan Houser, *Senior Litigation Counsel*, Office of Immigration Litigation, United States Department of Justice, Washington, D.C.

SUMMARY ORDER

UPON DUE CONSIDERATION of this petition for review of a Board of Immigration Appeals ("BIA") decision, it is hereby ORDERED, ADJUDGED, AND DECREED, that the petition for review is DENIED.

Jin Xin Ye, a native and citizen of the People's Republic of China ("China"), seeks review of an August 30, 2007 order of the BIA, vacating the November 21, 2003 decision of Immigration Judge ("IJ") George Chew, which granted her application for asylum. *In re Jin Xin Ye*, No. A096 253 582(B.I.A. Aug. 30, 2007), *vacating* No. A096 253 582 (Immig. Ct. N.Y. City Nov. 21, 2003). We assume the parties' familiarity with the underlying facts and procedural history in this case.

When the BIA issues an independent decision on remand from this Court, the Court reviews the BIA's decision alone. *See Belortaja v. Gonzales*, 484 F.3d 619, 622-23 (2dCir.2007). We review the agency's factual findings under the substantial evidence standard. 8 U.S.C. § 1252(b) (4)(B); see *also Corovic v. Mukasey*, 519 F.3d 90, 95 (2d Cir. 2008). We review *de novo* questions of law and the application of law to undisputed fact. *Salimatou Bah v. Mukasey*, 529 F.3d 99, 110(2d Cir. 2008).

Ye argues that the BIA erred in concluding that she failed to demonstrate eligibility for asylum, withholding of removal, and CAT relief. However, this argument fails where we have previously reviewed the BIA's consideration of similar evidence and have found no error in its conclusion that such evidence was insufficient to establish an objectively reasonable fear of persecution. See *Jian Hui Shao v. Mukasey*, 546 F.3d 138, 56-65 (2d Cir. 2008). Further, there is nothing in the BIA's decision compelling the conclusion that it failed to take into account all of Ye's evidence as we "presume that [the agency] has taken into account all of the evidence before [it], unless the record compellingly suggests otherwise." *See Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 337 n.17 (2d Cir. 2006).

Although Ye requests that this Court take judicial notice of external documents, we will not remand for the BIA to consider evidence that was not in the administrative record. *See* 8 U.S.C. § 1252(b) (4) (A); *Xiao Xing Ni v. Gonzales*, 494 F.3d 260, 269-70 (2d Cir. 2007). Further, contrary to Ye's argument that the BIA committed legal error by examining the record evidence de *novo*, the BIA properly made a legal determination that her evidence failed to demonstrate the objective reasonableness of her fear. *See Jian Hui Shao*, 546 F.3d at 162-63 (citing Ramsameachire v.

Ashcroft, 357 F.3d 169, 178 (2d Cir. 2004)).

For the foregoing reasons, the petition for review is DENIED. As we have completed our review, any stay of removal that the Court previously granted in this petition is VACATED, and any pending motion for a stay of removal in this petition is DISMISSED as moot. Any pending request for oral argument in this petition is DENIED in accordance with Federal Rule of Appellate Procedure 34 (a) (2), and Second Circuit Local Rule 34(b).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: S/ FOR THE COURT

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A96 253 582 - New York, NY

Date: August 30, 2007

In re: JIN XIN YE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Gary J. Yerman, Esquire

ORDER:

PER CURIAM. This record was last before the Board on July 20, 2005, when we sustained the Department of Homeland Security's (DHS) appeal.

In our previous decision we found that the respondent had failed to establish a well-founded fear of persecution should she be forced to return to China based upon the birth of her two children in the United States. In a Stipulation and Order of Settlement and Dismissal from the United States Court of Appeals for the Second Circuit entered on

December 22, 2006, between the respondent and the government, the case was remanded for further proceedings pending the outcome of the Board's forthcoming precedent decision in response to *Guo v. Gonzales*, 463 F.3d 109 (2d Cir. 2006). In *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007), the Board specifically considered the referenced documents cited in *Guo v. Gonzales, supra.* However, the Board held that the documents submitted reflect general birth planning policies in the respondent's home province that do not specifically show any likelihood that she or similarly situated Chinese nationals will be persecuted as a result of the birth of a second child in the United States. In *Matter ofJ-W-S-*, 24 I&N Dec. 185 (BIA 2007), the Board held that although some sanctions may be imposed pursuant to local family planning policies in China for the birth of a second child abroad, the applicant failed to provide evidence that such sanctions in Fujian Province or Changle City would rise to the level of persecution. The Board found in *Matter of* that, "[t]he evidence of record suggests that if a returnee who has a second child while outside China is penalized at all upon return, the sanctions would be fines or other economic penalties." *Id* at 191.

Accordingly, the DHS's appeal is sustained, the Immigration Judge's order of November 21, 2003, is vacated, and the respondent is ordered removed from the United States to China.

S/FOR THE BOARD

FOR THE BOARD

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 07-4062-ag
Filed: December 22, 2006
Thomas Asreen, Acting Clerk

JIN XIN YE,
Petitioner
Alien registration #: A 96-253-582

v.

BOARD OF IMMIGRATION APPEALS,
Respondent.

STIPULATION AND
ORDER OF
SETTLEMENT AND DISMISSAL

WHEREAS, petitioner, who is from China's Fujian Province, alleges a well-founded fear of future persecution if removed to China because she has more than one child, in apparent violation of family planning policy.

WHEREAS, petitioner's claim is similar to that at issue in *Guo v. Gonzales*, 463 F.3d 109 (2d Cir. 2006), which was remanded to the Board of Immigration Appeals ("BIA"), and is currently pending *en banc*,

IT IS HEREBY STIPULATED AND AGREED, by and between the parties as follows:

1. The Above-captioned petition for review is hereby dismissed, without costs or attorney's fees to any party, pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure.

2. Petitioner's case shall be remanded to the BIA for further proceedings pending the outcome in the BIA's forthcoming precedent decision in *Guo*. On remand, the BIA may hold the case pursuant to 8 C.F.R. §1003.1(e)(8)(iii) (allowing the Chairman of the Board to hold a case or group of cases where an impending *en bans* Board decision "may substantially determine the outcome").

Dated: December 18, 2006, NewYork, New York

S/ Gary J. Yerman
GARY J. YERMAN, 401 Broadway, Suite 1210, New York, NY 10013, (212) 219-0288.

Dated: December 18, 2006, Raleigh, NC

GEORGE E.B. HOLDING, United States Attorney, Eastern District of North Carolina
By: S/ Anne M. Hayes

ANNE M. HAYES, 310 New Bern Avenue, Suite 800, Raleigh, North Carolina, 27601-1461, Attorney for Respondent, 919-856-4530

SO ORDERED:
FOR THE COURT:
By: S/ FOR THE COURT December 22, 2006
Deputy Clerk (Date)

A TRUE COPY
Thomas Asreen, Acting Clerk

By: S/ FOR THE COURT
Deputy Clerk

CERTIFIED: January 11, 2007

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A96 253 582 - New York

Date: July 20, 2005

In re: JIN XIN YE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Gary J. Yerman, Esquire

ON BEHALF OF DHS: Meagen R. Sleeper, Assistant Chief Counsel

CHARGE: Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Asylum; withholding of removal, Convention Against Torture

ORDER:

PER CURIAM. The respondent is a native and citizen ofthe People's Republic of China (hereinafter "China"). The Department of Homeland Security (hereinafter "DHS," formerly the Immigration and Naturalization Service) has appealed the November 21, 2003, decision of the Immigration Judge granting the respondent's request for political asylum under section 208(a) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a). The appeal will be sustained.

We find that the respondent has not established a well-founded fear of future persecution should she be forced to return to China based upon the birth of her two children in the United States. [1] *See generally* 8 C.F.R. § 1208.13(a). Although the respondent contends she would be subject to the government's family planning policies if returned to China, she provided few facts about the basis for her claim and insufficient documentary evidence to demonstrate that a person in her circumstances - a parent of two United States citizen children - would have a reasonable fear of persecution. The respondent provided no evidence showing that Chinese citizens who have one or more children born in a foreign

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[1] We note that the respondent has not been been subjected to any past persecution. *See* Tr. at 14. Consequently, sheis Dzit entitted,to a presumption, of a well-founded fear of future persecution. *See* 8 C.F.R. § 1208.13(b)(1).

country are subjected to forced sterilization, torture, or other persecutory measures imposed under China's family planning policies. Thus, we do not find that the respondent sufficiently established her eligibility for asylum. It follows, therefore; that the respondent also failed to satisfy the clear probability standard of eligibility required for withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3). See, e.g., Ramsameachire v. Ashcroft, 357 F.3d 169, 178 (2d Cir. 2004). *See generally* 8 C.F.R. § 1208.16(b). *Finally,* inasmuch as the respondent failed to provide any evidence that she would be subject to torture upon her removal to China, we likewise deny her request for relief under the Convention Against Torture. See 8 C.F.R. § 1208.16(c)(2); see also Ramsameachire v. Ashcroft, supra at 184-86.

Accordingly, the DHS's appeal is sustained, the Immigration Judge's order of November 4, 2003, is vacated, and the respondent is ordered removed from the United States to the China.

S/ FOR THE BOARD
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
OFFICE OF IMMIGRATION JUDGE
NEW YORK, NEW YORK

File A 96 253 582 November 21, 2003

In the Matter of YE JIN XIN, Respondent.

IN REMOVAL PROCEEDINGS

CHARGE: 212(a)(6)(A)(i) of the Immigration and Nationality Act.

APPLICATIONS: Asylum, Withholding of Removal, Withholding of Removal under Convention Against Torture.

ON BEHALF OF RESPONDENT: Gary Yerman, Esquire, 401 Broadway, Suite 1210, New York, New York 10013

ON BEHALF OF DHS: Meagen Sleeper, Esquire, Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a 25-year-old female native and citizen of the People's Republic of China, who last

entered the United States on or about August 20, 2000, without inspection. The Immigration and Naturalization Service charged her with removability under Section 212(a)(6)(A)(i) of the Immigration and Nationality Act. At her hearing, the respondent has admitted the factual allegation contained in the Notice To Appear. Based on her admissions, removability has been shown by clear by convincing evidence: She did not designate a country of removal. The People's Republic of China has been designated by the Government. She has applied for relief under Section 208 of the Act. (Indiscernible) institutionally removed proceedings, also considered request withholding of removability under Section 241(b) (3). She's also applied for relief under Convention Against Torture.

The application was sent to the State Department pursuant to 8 C.F.R. 208.11. The Court has the Profile in evidence. The law on asylum, withholding of removal, withholding of removal under the Convention Against Torture, the Court will not recite the law in its decision. The respondent testified that she left China because of some problems she had at the factory. She was being harassed by a cadre who came in looking to marry her. They arranged a marriage, he was a loathsome creature that she did want to have anything to do with. She decided to go through with the procedure to assist a family, however, as the date drew nearer, she could not stomach the idea of being married to this gentleman, and her family arranged for her to come to the United States. She traveled to Vietnam to

France, and finally showed up in the shores of this country in August of 2000. She located in Arkansas where she met another man from Fuzhou. They then got married, and now she has two children, both U.S. citizens. The children have been sent back to live with the family in China. She states that they are both U.S. citizens, and, consequently, they have nothing to fear from, the Chinese authorities. She states, however, if she were to return to China, she would be subject to the family planning laws because she has more than two children, and she still wants to have another child, especially a boy since that is what the Chinese families do. She states that she has two other siblings. After the birth of the last sibling, the younger sister, her Mother was sterilized. She only recently found this out since this occurred some time in 1992.

Congress in its infinite wisdom amended the definition of refugee to include those who have been forcibly sterilized, or aborted, or deemed to have suffered past persecution. The Board in *X-P-T-*, 3299 (BIA 1996) confirmed that, and *C-Y-C-*, 3319 (BIA 1997) extended that for spouses. In this case, the respondent fears returning to China because she's had two U.S. citizen children here.

Respondent's counsel has submitted as Exhibit 4, the counsel information sheet which indicates that the children who were born outside of China to people who are not settled, or considered to be PRC nationals, regardless of their citizenship. The Court finds in the absence of any jurisprudence that the

respondent does have a fear of returning to China, which is well- founded based on the family planning law of China. The Court recognizes that there have been several unreported Board decisions that have held the other way, however, this was based on the current Profile, which is also in evidence, which indicates that children born outside of the country are treated differently than people those who were born in China. However, the Court, until instructed by the Board, will continue to grant cases of persons who have more than two children born in the United States. Accordingly, in this case, the Court will grant asylum on a conditional basis.

GEORGE T. CHEW
United States Immigration Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 08-4785-ag
Filed: July 9, 2009

YUNXIA LIU, LIAN JIN WANG,
Petitioners,

v.

ERIC H. HOLDER JR., UNITED STATES ATTORNEY GENERAL,
Respondent.

Judges Present: Dennis Jacobs, *Chief Judge,* Jon O. Newman, John M. Walker, Jr., *Circuit Judges.*

FOR PETITIONERS: Gary J. Yerman, New York, New York.

FOR RESPONDENT: Michael F. Hertz, *Acting Assistant Attorney General, Civil Division*; James E. Grimes, *Senior Litigation Counsel*; Daniel Glenn Lonergan, *Trial Attorney*, United States Department of Justice,Washington, D.C.

UPON DUE CONSIDERATION of this petition for review of a Board of Immigration. Appeals ("BIA") decision, it is hereby ORDERED, ADJUDGED, AND DECREED, that the petition for review is DENIED.

Yunxia Liu and Lian Jin Wang, both natives and citizens of the People's Republic of China ("China"), seek review of a September 10, 2008 order of the BIA, vacating the December 1, 2004 decision of Immigration Judge ("IJ") Margaret McManus, which granted their applications for asylum. *In re Yunxia Liu, Lian Jin Wang,* Nos. A097 478 691, A073 162 913 (B.I.A. Sept. 10, 2008), vacating Nos. A097 478 691, A073 162 913 (Immig. Ct. N.Y. City Dec. 1, 2004). We assume the parties' familiarity with the underlying facts and procedural history in this case.

When the BIA issues an independent decision on remand from this Court, the Court reviews the BIA's decision alone. *See Belortaja v. Gonzales,* 484 F.3d 619, 622-23 (2d Cir. 2007). We review the agency's factual findings under the substantial evidence standard. 8 U.S.C.1252(b)(4)(B); *see also Corovic v. Mukasey,* 519 F.3d 90, 95 (2d Cir. 2008). We review *de novo* questions of law and the application of law to undisputed fact. *Salimatou Bah v. Mukasey,* 529 F.3d 99, 110 (2d Cir. 2008).

Petitioners argue that the BIA erred in concluding that they failed to demonstrate

eligibility for asylum, withholding of removal, and CAT relief. However, this argument fails where we have previously reviewed the BIA's consideration of similar evidence and have found no error in its conclusion that such evidence was insufficient to establish an objectively reasonable fear of persecution. *See Jian Hui Shao v. Mukasey*, 546 F.3d 138, 156-65 (2d Cir. 2008). Further, there is nothing in the BIA's decision compelling the conclusion that it failed to take into account all of Petitioners' evidence as we "presume that [the agency] has taken into account all of the evidence before [it], unless the record compellingly suggests otherwise." *See Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 337 n.17 (2d Cir. 2006). Although Petitioners assert that the agency failed to accord sufficient weight to their particularized evidence, we decline to find that the agency abused its discretion. *See Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 342 (2d Cir. 2006) (finding that the weight afforded to documentary evidence lies largely within the discretion of the agency).

For the foregoing reasons, the petition for review is DENIED. As we have completed our review, any stay of removal that the Court previously granted in this petition is VACATED, and any pending motion for a stay of removal in this petition is DISMISSED as moot. Any pending request for oral argument in this petition is DENIED in accordance with Federal Rule of Appellate Procedure 34(a)(2), and Second

Circuit Local Rule 34(b).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: S/ FOR THE COURT

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

Files: A097-478-691, A073 162 913- New York, NY

Date: September 10, 2008

In re: YUNXIA LIU, LIAN JIN WANG

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Gary J. Yerman Esquire

CHARGE:Notice: Sec. 212(a)(6)(A)(i) I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] – Present without being admitted or paroled (both respondents)

APPLICATION: Asylum; withholding of removal; Convention Against Torture

This case was first before us on May 12, 2006, when we sustained the Department of Homeland Security's (DHS) appeal of an Immigration Judge's decision granting the respondents' application for asylum and withholding of removal to China. The respondents' claim was based on opposition to China's coercive

family planning policy because they now have two United States citizen children. On December 19, 2006, the United States Court of Appeals for the Second Circuit remanded proceedings back to us to consider additional evidence referenced in *Gao v. Gonzales*, 463 F.3d 109 (2d Cir. 2006). and *Jin Xiu Chen v. U.S. Dep 't of Justice*, 468 F.3d 109 (2d Cir. 2006). We denied the claims again on August 23, 2007, citing our recent decisions in *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007) and *Matter of J-W-S-*, 24 I&N Dec. 185 (BIA 2007). In a decision dated March 27, 2008, the Second Circuit remanded a second time for a new decision which evaluates the particular facts and evidence of record.

In reviewing the evidence again, we find no error in our prior decision. The respondents are husband and wife who married here in the United States in 2001. They have two children who were born here, one in 2001 and other in 2003. In originally finding that the respondents had failed to establish a well-founded fear of persecution or that it is More likely than not they will be persecuted or tortured if returned to China, we examined a 2004 Profile of Asylum Claims from China which had been submitted by the respondents. We found that this evidence, which indicated that economic sanctions were more likely in the event of family planning violations, particularly in more recent years, outweighed the anecdotal evidence from the respondents' relatives which was not corroborated or very detailed (BIA Dec. 19, 2006, at 2). We find no error in our conclusions.

In addition, the respondents had submitted a 1998 report on a hearing before Congress discussing China's population control policy, a 2002 newspaper article on second child restrictions in, China, and a copy of China's family planning law. China's law does not specify that a returning national who has violated China's family planning policy will be forcibly sterilized; in fact, the Profile on China states that central government policy prohibits the use of physical coercion to force abortions or sterilization, The newspaper article, which discusses the exceptions to the one-child policy, also does not provide probative evidence that the respondents will be sterilized upon return to China. Although the hearing report does state that women who violate China's policy may face a forced abortion or sterilization, the report is not current and it does not reference the situation of foreign- born children. Furthermore, the Profile referenced above indicates that the frequency of coercive population control tactics is declining, although exact data is difficult to obtain.

The respondent also submitted affidavits from demographer John Shields Aird. We analyzed these documents in *Matter of J-W-S-, supra*, and *Matter of C-C-*, 23 I&N Dec. 899 (BIA 2006), and found that they were not based on personal knowledge of conditions in China. Therefore, we concluded that the generalized statements contained therein did not support a finding that returning nationals would be forcibly sterilized for having had children while abroad. *Matter of J-W-S, supra*, at 189. We find no

basis for concluding otherwise in this case.

The DHS had also submitted evidence which included excerpts from two reports from its Resource Information Center (RIC), as well as a relevant portion of a report from the United Kingdom. All three documents support the conclusion that returning nationals who have above-quota children are treated more leniently than those who violate the policy while in China and that, in particular, the Fujian. Province, where the respondents resided, has instituted a more lax implementation of China's policy which would not include forcible sterilization.

Finally, we note that similar and, to some extent, much more recent documentary evidence was analyzed in both our decisions in *Matter of J-W-S-* and *Matter of S-Y-G-*, where we found that the aliens failed to establish that they would be forcibly sterilized for having had foreign-born children; we found that, in general, aliens returning to China with foreign-born children were subjected to economic sanctions. Since the respondents have failed to submit any evidence prior to these decisions which conflicts with our conclusions about their claims, and have also failed to update the record with more current evidence which would require a remand for further assessment of their claim, we are satisfied that they have failed to meet their burden of proof and are not entitled to relief pursuant to *Matters of J-W-S-* and *S-Y-G-*.

ORDER: The respondents' appeal is dismissed.

S/ FOR THE BOARD
FOR THE BOARD

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 07-3911-ag
Filed: March 27, 2008
Catherine O'Hagan Wolfe, Clerk

YUNXIA LIU AND
LIAN JIN WANG,
A97-478-691/73-162-913
Petitioners,

v.

MICHAEL B. MUKASEY,
U.S. ATTORNEY GENERAL,
Respondent,

STIPULATION AND ORDER

WHEREAS, Petitioners Yunxia Liu and Lian Jin Wang ("Petitioners") filed a petition for review of August 23, 2007, decision of the Board of Immigration Appeals ("Board") affirming its previous denial of asylum and withholding of removal.

WHEREAS, on December 19, 2006, this Court remanded Petitioners' case to the Board for consideration of the so-called "Shou Yung Guo" documents;

WHEREAS, the Board denied Petitioners' asylum and withholding of removal claims on remand based on its decisions in *Matter of S-Y-G-*, 24 I&N Dec.247 (BIA 2007) and *Matter of J-W-S-*, 24 I&N Dec.185 (BIA 2007),without addressing the particular facts or record evidence in this case;

IT IS HEREBY STIPULATED AND AGREED, by and between the parties as follows:

1. The above-captioned petition for review is hereby withdrawn without prejudice and without costs, expenses, or attorney's fees to any party.

2. The Board's August 23, 2007 decision is hereby vacated.

3. Petitioners' case shall be remanded to the Board for entry of a new decision based on an evaluation of the particular facts and record evidence in this case.

4. By entering into this Stipulation the Government does not make any representation or admission concerning: (i) the merits of the instant petition; (ii) whether Petitioners are eligible for, or otherwise merit, any benefit; or (iii) any other matter.

Dated: March 7, 2008, New York, NY

By: S/ Gary J. Yerman

GARY J. YERMAN, Esq. 401 Broadway, Suite 1210, New York, NY 10013, Attorney for Petitioner, (212) 219-0288

JEFFREY S. BUCHOLTZ, Acting Assistant Attorney General, Civil Division

Dated: March 7, 2008, Washington, D.C.

TERRY J. SCADRON, Assistant Director

S/ COREY L. FARRELL
COREY L. FARRELL, Attorney , U.S. Department of Justice, Civil Div. , Office of Immigration Litigation, P.O. Box 878, Ben Franklin Station, Washington, D.C. 20044, (202) 305-4923

S/ SO ORDERED
FOR THE COURT
Catherine O'Hagan Wolfe, Clerk of Court

By: S/ Lisa J. Greenberg
Lisa J. Greenberg, Staff Counsel

CERTIFIED: March 27, 2008

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

Files: A97-478-691, A73-162-913 – New York, NY

Date: August 23, 2007

In re: YUNXIA LIU, LIAN JIN WANG

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Gary J. Yerman, Esquire

CHARGE: Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] – Present without being admitted or paroled (both respondents)

APPLICATION: Asylum; withholding of removal; protection under the Convention Against Torture

This case was last before us on May 12, 2006, when we.sustained the Department of Homeland Security's (DHS) appeal of an Immigration Ridge's decision granting the respondents asylum and withholding of removal to China. The respondents' claim of

persecution was based on opposition to China's coercive family planning policy because they have two United States citizen children. We found that the documentary evidence did not establish that the Fujian province, where the respondents are from, has a record of forced abortion or sterilization, and that generally only economic sanctions are imposed on persons considered to have violated the family planning policy.

On December 19, 2006, the United States Court of Appeals for the Second Circuit vacated our order and remanded proceedings. The court did not find our previous decision in error and, in fact, noted that since we considered the background evidence of record to conclude that the respondents had failed to meet their burden of establishing a well-founded fear of persecution, our decision complied with precedent case law and was supported by the record. *See. Wang v. BIA,* 437 F.3d 270 (2d Cir. 2006); *Huang v. INS,* 421 F.3d 125 (2d Cir. 2005). The court remanded, however, in order for the Board to consider additional evidence referenced in *Gao v. Gonzales,* 463 F.3d 109 (2d Cir. 2006) *and. Jin Xiu Chen v. United States Department of Justice,* 468 F.3d 109 (2d Cir. 2006).

Pursuant to two recent precedent decisions, we will reaffirm our previous decision finding the respondents ineligible for asylum and withholding of removal. *See Matter of S-Y-G-,* 24 I&N Dec. 247 (BIA 2007); *Matter of J-W-S-,* 24 I&N Dec. 185 (BIA 2007); *see also Matter of J-H-S-,* 24 I&N Dec. 196 (BIA 2007).

The remand in *Gao v. Gonzales, supra* resulted in our decision in *Matter of S-Y-G-, supra,* wherein we held that the documents submitted, including those: discussing local province and village family planning decisions reflected general birth planning policies which did specifically show any likelihood that the alien or similarly situated Chinese: nationals will be persecuted as a result of the birth of a second child in the United States. Similarly, in *Matter of J-W-S-, supra,* we found that although some sanctions may be imposed pursuant to local family planning policies in China for the birth of a second child abroad, the alien failed to provide evidence that such sanctions in Fujian Province or Changle City would rise to the level of persecution. As the respondents' case is clearly controlled by these precedent decisions, we find it unnecessary to engage in further review of the evidence.

ORDER: We reaffirm our previous decision sustaining the Department of Homeland Security's appeal and vacating the Immigration Judge's decision granting the respondents asylum and withholding of removal.

S/ FOR THE BOARD
FOR THE BOARD

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 06-2687-ag
Filed: December 19, 2006

YUNXIA LIU, LIAN JIN WANG,
Petitioners,

v.

BOARD OF IMMIGRATION APPEALS,
Respondent.

Judges Present: ROBERT D. SACK, REENA RAGGI, RICHARD C. WESLEY, *Circuit Judges.*

FOR PETITIONER: Gary J. Yerman, New York, New York.

FOR RESPONDENT: Amul R. Thapar, United States Attorney, Eastern District of Kentucky, Charles P. Wisdom, Appellate Chief, Cheryl D. Morgan, Assistant United States Attorney, Lexington, Kentucky.

SUMMARY ORDER

UPON DUE CONSIDERATION of this petition for review of a decision of the Board of Immigration

Appeals ("BIA"), it is hereby ORDERED, ADJUDGED, AND DECREED, that the petition for review is GRANTED, the BIA's decision is VACATED, and the case is REMANDED to the BIA.

Yunxia Liu and Lin Jin Wang, natives and citizens of China, seek review of a May 12, 2006 order of the BIA reversing immigration judge ("IJ") Margaret McManus' December 1, 2004 decision granting Liu's and Wang's application for asylum. In re *Yunxia Liu, Lin Jin Wang*, Nos. A97 478 691, A73 162 913 (B.I.A. May 12, 2006), *rev'g* A97 478 691, A73 162 913 (Immig. Ct. N.Y. City Dec. 1, 2004). We assume the parties' familiarity with the underlying facts and procedural history of the case.

Where, as here, the BIA does not adopt the decision of the IJ to any extent, this Court reviews only the decision of the BIA. See *Yan Chen*, 417 F. 3d 268, 271 (2d Cir. 2005); *Jin Yu Lin* v. U.S. Dep't of Justice, 413 F.3d 188, 191 n.4 (2d Cir. 2005). This Court reviews the agency's factual findings under the substantial evidence standard, treating them as "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B); *see, e.g., Zhou Yun Zhang v. INS*, 386 F.3d 66, 73 & n.7 (2d Cir. 2004). However, it will vacate and remand for new findings if the agency's reasoning or its fact-finding process was sufficiently flawed. *Cao He Lin v. U.S. Dep't of Justice*, 428 F.3d 395, 406 (2d Cir. 2005);

Tian-Yong Chen v. INS, 359 F.3d 121, 129 (2d Cir. 2004); *see also Xiao Ji Chen v. U.S. Dep't of Justice*, 434 F.3d 144, 158 (2d Cir. 2006) (agreeing with this principle, but avoiding remand, in spite of deficiencies in an adverse credibility determination, because it could be confidently predicted that the IJ would adhere to the decision were the case remanded).

The BIA noted that Fujian province did not have a current record of forced abortions or sterilizations. It also noted that State Department material in the record indicated only that the Chinese government imposed economic penalties on families that do not comply with family planning laws. This Court has consistently required specific evidence in the record indicating a possibility of future involuntary abortion or sterilization in order to establish prima facie eligibility for relief based on United States-citizen children. *See, e.g., Jian Xing Huang v. INS*, 421 F.3d 125, 129 (2d Cir. 2005) (finding that, "[i]n the absence of solid support in the record" for Petitioners' assertion that he would be subjected to persecution on account of his two U.S. born children, "his fear [was] speculative at best"); *Wei Guang Wang v. BIA*, 437 F.3d 270, 274 (2d Cir. 2006) (finding that an affidavit by Dr. John Aird and the 1998 State Department Profile of Asylum Claims were not alone sufficient to establish prima facie eligibility for relief, and requiring more specific evidence that U.S.-born children would be counted as Chinese citizens

under the family planning policy in order to succeed on claims for relief); *see also Matter of C-C-*, 23 I. & N. Dec. 899 (BIA 2006) (holding that an alien seeking to reopen removal proceedings based on a claim that the birth of a second child in the United States would result in the alien's forced sterilization in China could not establish prima facie eligibility for relief where the Aird affidavit and the relevant country conditions reports did not indicate that Chinese nationals returning to that country with foreign-born children have been subjected to forced sterilization in the alien's home province). Additionally, although this Court warned in *Tian-Yong Chen v. INS*, 359 F.3d 121, 130 (2d Cir. 2004) against overreliance on State Department material, State Department reports are probative. *Tu Lin v. Gonzales*, 446 F.3d 395, 400 (2d Cir. 2006). Because the BIA considered the State Department's country materials in conjunction with Liu's and Wang's testimony and submitted documentary evidence and reasonably determined that nothing indicated that they would be subject to involuntary abortion or sterilization due to their United States-citizen children, its determination that Liu and Wang failed to establish a well founded fear of future persecution is supported by the record as a whole.

However, in *Shou Yung Guo v. Gonzales*, 463 F.3d 109 (2d Cir. 2006), we remanded the case to the BIA for further consideration of materials overlooked by the BIA in denying a motion to reopen. There, we found that the BIA had failed to

sufficiently examine the Fujian province family planning decisions presented by the petitioner in support of the motion to reopen, noting that it was not apparent that the BIA had "paid any attention" to the documents. More recently, in *Jin Xiu Chen v. U.S. Dep't of Justice*, --- F.3d ---, 2006 WL 3190313 at * 2 (2d Cir. Nov. 6, 2006), we took cognizance of the *Shou Yung Guo* documents despite the petitioner's failure to bring them to our attention, and determined that the documents necessitated remand to the BIA. Because the existence of these presumably important documents cannot be overlooked, we remand this case to the BIA for further consideration of the petitioners' asylum and withholding claims in light of these documents. Because the petitioners have failed to sufficiently argue the merits of the agency's denial of CAT relief before this Court, we deem any such arguments waived. See *Yueqing Zhang v. Gonzales*, 426 F.3d 540, 541 n.1, 545 n.7 (2d Cir. 2005).

For the foregoing reasons, the petition for review is GRANTED, the BIA's decision is VACATED, and the case is REMANDED to the BIA for further proceedings consistent with his order. Petitioner's motion for stay of removal is GRANTED. Any pending request for oral argument in this petition is DENIED in accordance with Federal Rule of Appellate Procedure 34(a)(2), and Second Circuit Local Rule 34(d)(1).

FOR THE COURT:
Thomas Asreen, Acting Clerk

By: S/ Oliva M. George
Oliva M. George, Deputy Clerk

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

Files: A97-478-691, A73-162-913 – New York, NY

Date: May 12, 2006

In re: YUNXIA LIU, LIAN JIN WANG

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Gary J. Yerman, Esquire

CHARGE: Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] – Present without being admitted or paroled (both respondents)

APPLICATION: Asylum; withholding of removal; protection under the Convention Against Torture

In a decision dated December 1, 2004, an Immigration Judge granted asylum to the respondents based on the coercive population control program in their native country. See section 101(a)(42) of the Act, 8 U.S.C. § 1101(a)(42). DHS

filed a timely appeal of that decision. The appeal will be sustained.

The respondents are husband and wife, both are natives and citizens of the People's Republic of China The respondents entered the United States without inspection - the male in 1993 and the female in 2000[2]. The respondents married in the United States on March 5, 2001. Two children were born to the couple in the United States; a boy born in March 2001 and a daughter in October 2003. The male respondent was placed into removal proceedings in 1998, while the female respondent was placed into proceedings in 2003.

The respondents' claims rest upon their fear that if returned to China with their two minor children, they would be subjected to the family planning policy. The female respondent fears that because she already has two children, she will be sterilized. Additionally, she and her husband want more children (Tr. at 50). Although the respondents have relatives both in the United States and China who have allegedly suffered under the coercive population control program in China, none of the relatives appeared as witnesses or submitted written documents substantiating the information

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[2] The decision of the Immigration Judge indicates that the female respondent entered the United States in March 2002 (I.J. at 2). The respondent indicated that she entered this country in March 2000 (Tr. at 45). For purposes of our review, we will assume that the decision contains a typographical error.

given about them by the respondents. The Immigration Judge found both respondents credible (I.J. at 6).

The Immigration Judge concluded that the respondents had a well-founded fear of persecution and so granted asylum relief. She focused in her decision upon the objective fear requirement of asylum analysis and reasoned from the background evidence that the respondents' two children would count for family planning purposes and the fact that they were born in the United States would not be relevant. Consequently, in the event that the female respondent became pregnant, as was her intent, she would be subjected to an abortion (I.J. at 8).

We have considered case law from the United States Court of Appeals for the Second Circuit, in whose jurisdiction this case arises, which was issued after the Immigration Judge's decision in this matter. *See Wang v. BIA*, 437 F.3d 270 (2d Cir. 2006); *Huang v. INS*, 421 F.3d 125 (2d Cir. 2005).

We find that the Immigration Judge's grant of relief does not comply with controlling case law from the Second Circuit. The Immigration Judge granted the respondent's application on the basis of well founded fear of future persecution. We reverse that decision.

Fujian, the respondents' home province does not have a current record of forced abortion or

sterilization, although the Provincial Planning Committee acknowledges that there were isolated cases of forced operations in the 1980's and 1990's. Additionally, local physicians in contact with the United States Consulate General report they have not seen signs of forced operations. Importantly for the matter before us, the government only imposes economic penalties on families that do not comply with the family planning law. *See China: Profile of Asylum Claims and Country Conditions (Exh. R-6) (hereinafter Profile),* 2004, published by the State Department of the United States at 23. Given this evidence, we can agree with that portion of the Immigration Judge's decision in which she states that the respondent's two children would be counted for family planning procedures but we can not find that the female respondent faces the possibility of abortion or sterilization. *See also In re C-C-*, 23 I&N Dec. 899 (BIA 2006) (to establish prima facie eligibility for reopening based upon the birth of a second child in the United States, an alien must submit evidence, including the relevant country conditions reports which indicate that Chinese nationals returning to that country with foreign-born children have been subjected to forced sterilization in the alien's home province).

We conclude that the neither the scanty anecdotal information from the respondents about their relatives' treatment under the population planning program, devoid of any corroboration or description of the locale in which the woman lived, the time frame of the forced operation, and the

number of and sex of her children at time of the operation nor the other information in the record outweighs the evidence present in the *Profile*. *See Wang v. BIA, supra*. The DHS appeal is sustained.

ORDER: The DHS appeal is sustained. The decision of the Immigration Judge is vacated. The respondents are ordered removed.

S/ FOR THE BOARD
FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
NEW YORK, NEW YORK

File A 97 478 691, A73 162 913 December 1, 2004

IN REMOVAL PROCEEDINGS

In the Matter of LIU YUNXIA, WA NIN XI,
Respondents

CHARGE: 212(a)(6)(A)(I).

APPLICATION: Asylum and withholding.

ON BEHALF OF RESPONDENT: Mr. Yerman,
Esquire

ON BEHALF OF DHS: Mr. Larnoff, Esquire

ORAL DECISION OF THE IMMIGRATION
JUDGE

The respondents are a married couple. They are natives and citizens of the People's Republic of China. Their arrival information is indicated in their respective Notices to Appear with the exception of the filing of 691 which has an

unknown place and date of entry alleged, but the respondents were placed in proceedings at different times. The male respondent was placed in proceedings in 1998. The Notice to Appear in his case alleged an entry in 1993. They are both relying on the same claim at this point, which is based on family planning.

At a prior hearing, the Government waived the one year issue as to the female respondent because of the new circumstances, that would be the U.S. citizen children that were born and that is the basis for their. claim, that they have two United States citizen children that they would be subjected to the family planning policy in China should they return to China with those two children. The respondents are relying on *Matter of X-P-T-* and *C-Y-Z-*.

They have submitted applications for asylum. The male respondent submitted an amended application which is basically considered to be a new application given the fact that he withdrew his application previously and that fact again that this claim arose in the United States subsequent to that time. The respondents both testified in support of their application. There have been submissions from both parties on the issue of general background materials.

The female respondent testified that she came into United States in March 2002. Regarding family planning policies, she said that her older sister's husband had problems with family planning. He was

sterilized after two children and the first was a girl. They had not waited the proper time, which would be four years between the birth of the first and second children even though the first child was a girl because they failed to comply with the requisite spacing of the children and that the second child was born within a very short time after the birth of the first one. The brother-in-law of the wife was sterilized.

She testified that her sister is also from the same part of China which is Fujian province, that neither of those people, that would be her sister and brother-in-law, are in the United States.

She testified that she has a male cousin who is in the United States. She thinks that he was granted asylum based on the fact that his family had two children and his wife was sterilized. She said he was unavailable to testify because he works nights and sleeps days. They are not in close contact, despite the fact that he lives very close to the Court, frankly. She testified that they really do not have a lot of contact with each other. He has not even seen her two children. The female respondent testified that she and her husband are from different towns, but that the family planning policy is the same. That is, again if the first child is a boy, the second child is not allowed. If the first child is a girl, you must wait four years in order to have a second child. Again, that was the problem her sister had. She has been advised by her family in China that the family planning policy continues to be that same policy she testified about.

She believes if they return to China that she would definitely be sterilized because they already have two children and they would like to have additional children. She said if they were sterilized, they would never have that opportunity.

In addition to not being able to have children if she was sterilized, she said that she is fearful generally about the procedure and is afraid of any pain that would be involved. There were other things that she testified about which had to do with an injury at her place of work which really is not a basis for asylum. She was, prior to coming to the United States, subject to gynecological examinations in China. She was asked why she has no statement from any of these relatives either in the United States or in China about their problems with family planning policy. She said she did not ask her parents for any statement because she thought that she would just tell the Court here the truth. She has a household registration that is an agricultural household registration.

The male respondent testified that he came into the United States July of 1993 at the age of 19. They met and married in the United States. They were married March 5, 2001, and actually registered their marriage in the United States March 4, 2003. They have provided evidence and testimony about the two children that they have born in the United States. Their son was born November 5, 2001. Their daughter was born October 6, 2003.

Now the male respondent has several relatives in the United States including an older brother, younger brother and a younger brother-in-law. He believes that his younger brother was granted asylum based on the family planning policy in China. Although he was not exactly sure about that, he thought that his brother had some problems because of his younger sister. So he did not ask him to come to court. He was very frank. He said he has heard about family planning from his parents, but he really does not have a lot of details about the family planning policy. The respondent testified that he was informed that his younger sister was asked to have an IUD after birth of a child. She hired a private doctor to have it removed. She became pregnant again. The government found out when she was five or six months pregnant. She was seized for an abortion. His brother-in-law was at home at the time and had an argument with the family planning officials, was beaten up, and they still have only one child as a result. That was in about 1997. He testified that he constantly hears about people in this area having similar problems. After he and his wife were married, his wife told him about her older sister's problems, that when she was pregnant with her second child, the government wanted to have her be aborted, however there was some health concerns and because of that she was not aborted, but eventually that woman's husband was sterilized. He testified that he has been told that they have two children and that the second child was born without permission.

He testified also that because they have two children, either he or his wife will be sterilized if they return to China. The government would know about the children when they attend school, if not before because they would have to be registered. He said that there may be some exceptions to the family planning policy. He said, for example, if the husband is an only child, which is not his situation, or if you were related to government officials, which is also not their situation. They both testified that their son was in China for a while, I believe about two years, with his grandmother. The male respondent testified that he did that because they had a difficult financial situation here and his parents offered to help and ease their financial burden by taking care of their son. Because his son would be going to school next year, they brought him back to the United States. Their daughter has never been to China.

He testified, as his wife did, that they would like to have additional children. He said another one. She said children. He also testified that if they had been in China, they would not have been allowed to have the second child because the first one was a boy.

He said the same thing his wife did, that he did not ask any of his relatives for a letter because he thought everything that he would say in court would be the truth and apparently that would be enough. He is likewise an agricultural household.

The respondents, I am satisfied, have both been credible in their testimony. The male respondent obviously had withdrawn his application and accepted voluntary departure some time ago and did not leave. That is obviously a negative factor. Dealing first then with her case, and she does not have any adverse factors to be considered, will be easier, although their claim is absolutely identical. They both have testified that they have subjective fear of implementation of the family planning policy should they return to China. I think they clearly both have subjective fear. The question is whether or not it is objectively reasonable based on the fact that the two children were born in the United States. There is quite a lot of background material that has been submitted by respondent. The most recent profile the Government submitted, which is Exhibit 6, specifically on page 26 addresses claims based on birth in the United States. And frankly, I think this helps their case. It says that unless one of the parents is an overseas Chinese that would be having residency rights in another country, which neither of these people have, a family with a U.S. born child or children receives no special treatment under family planning laws. That is pretty clear. So it is not that the kids do not count. If they go back to China, they would take the two children, the government of China would eventually know about these children at least at the time they registered for school, if not before. And according to the profile regarding family planning that is part of Exhibit R-6 of the reopened hearing, this no special treatment given to the U.S. citizen children. So therefore, in my view, that means

that the kids are treated the same. They count for family planning purposes.

The issue is whether or not they would be persecuted because they have these two children. While the profile claims that the U.S. Government representatives in China were not aware of any cases in which returnees from the United States were forced to undergo sterilization procedures upon their return, it does not say that people who come back from the United States with citizen children who do not meet this exception of overseas Chinese, do not have problems in the future because of the family planning policy. They have both testified about relatives that had two children and were sterilized. So it is not the return that is the issue. The issue is whether or not the two children count. According to this, they are not treated in any special way, so they would count. Whether or not already having two children, the first being a boy, obviously if they had been in China they could not have had the second one. By having a second one, that is a violation of the family planning policy. The second one was then born too soon, even if the second one had been allowed, that is another violation of the family planning policy. But importantly, they both testified they want to have more children. They could not have even had the second one had they been in China and since they both want to have more children, it seems tome that the government of China would, at a minimum, not allow that, and if there was a third pregnancy, then they would be subjected to possible abortion and/or sterilization after the birth of

a third child even if they were successful in giving birth to the third child. I think this is obviously a perspective case. The profile also talks about the fact that the government was likely to learn about the children. I think they would through neighbors or when they registered for any benefits including education. So I think that the respondents, in fact, have demonstrated a well-founded fear of persecution even if they go back, which is the two children, given the date of birth of the second child, and that in the event they tried to have a third child, which I think is likely, and their testimony credible, that they would then be subjected to future persecution on that basis. And this would be in excess of just paying extra social compensation fees or school fees since the profile clearly says that anybody going back to China from the United States would be expected to conform to the restrictions in Chinese law in future offspring. So I think that is significant.

That being the case, I think that they have demonstrated a well-founded fear of persecution should they go back. It probably would have been better if they brought in somebody to testify about what had happened to them in China, but I believe their testimony and I think it is clear that the third child would not be allowed, so I to not think that is significant. And because the wife's case is easier, it does not have any negative factors, it is easier to grant her case first. That being the case, the husband did not leave. That is obviously a negative factor, but with her being granted, and with the fact that they do have these two citizen children, I think it would be

inappropriate to deny his application in the exercise of discretion given the equities that he has in the United States. Therefore, the following orders will be entered.

ORDER

IT IS ORDERED that the respondents be granted asylum pursuant to INA Section 208 in the exercise of discretion, conditioned upon administrative determination by the Government and their numbers are available to such a grant under Section 207(a)(5) of the Immigration and Nationality Act.

IT IS FURTHER ORDERED the respondents be granted withholding in view of the Board's decisions on these matters.

PATRICIA MCMANUS

Immigration Judge